

No. 1-11-1918

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 27134
	)	
OMAR AGUILAR,	)	Honorable
	)	Angela M. Petrone,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Presiding Justice Connors and Justice Delort concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court's admission of the defendant's videotaped statement to the police was harmless error; the trial court did not err in allowing the State to elicit testimony from a witness regarding why she had initially refused to speak with the police concerning the crime; defense counsel was effective at trial.

¶ 2 Following a jury trial in the circuit court of Cook County, defendant Omar Aguilar was convicted of first-degree murder and aggravated discharge of a firearm. Subsequently, he was sentenced to 65 years of imprisonment. On appeal, the defendant argues that: (1) the trial court erred in denying his pretrial motion *in limine* to bar his videotaped statement to the police; (2)

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the trial court erred in allowing the State to elicit trial testimony from a witness regarding why she had initially withheld from the police information concerning the crime; (3) defense counsel was ineffective for eliciting opinion testimony from a police detective at trial regarding the defendant's guilt, and for failing to tender a limiting instruction regarding gang evidence. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On November 9, 2006, at approximately 7 p.m., a shooting occurred near 28th Street and Spaulding Avenue in Chicago, Illinois, which resulted in the death of Luis Hernandez (Luis). On that same day, November 9, 2006, the defendant was arrested and later charged with the first-degree murder of Luis and aggravated discharge of a firearm in the direction of another individual, Carlos Menchaca (Carlos).

¶ 5 On August 14, 2007, the defendant filed a pretrial motion to suppress statements (motion to suppress) he made to the police, alleging that his custodial statements were elicited in violation of his constitutional rights and that they were not voluntary. On September 30, 2008, the trial court denied the motion to suppress.

¶ 6 On September 8, 2009, the defendant filed a pretrial motion *in limine* to bar admission into evidence his videotaped statement to the police (motion *in limine*), as well as transcripts of the videotaped statement, alleging that the videotaped statement was largely inaudible. On December 23, 2009, the trial court granted in part and denied in part the motion *in limine*, finding that the transcripts of the videotaped statement were inaccurate and thus, inadmissible, but finding that the videotaped statement may be admitted at trial where portions of the videotape were audible and where the videotape showed the demeanor of both the defendant and the police officers during interrogation.

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¶ 7 On August 4, 2010, a jury trial commenced. Carlos testified on behalf of the State that at approximately 7 p.m. on November 9, 2006, he and Luis were standing and talking near an alley on 28th Street between Spaulding and Christiana Avenues in Chicago. After talking for about five minutes, Carlos and Luis turned to go separate ways. As Carlos headed southbound down the alley and Luis headed eastbound, Carlos heard a gunshot. Carlos immediately noticed a black four-door car stop at the entrance of the alley. The car was occupied by a female driver, a female front passenger, and a male passenger in the backseat. Carlos observed the male passenger shooting a gun with his arm extended from an open window from the backseat of the car. Upon hearing the gunshots, Carlos ran and hid behind a garbage can in the alley, while Luis ran eastbound on 28th Street. According to Carlos, the male individual in the backseat of the car "followed" Luis with his gun and continued shooting at him. Once the shooting stopped, the car sped away westbound on 28th Street. Carlos then ran out into the street and saw Luis unresponsive and lying in the street. Carlos testified that at the time of the incident, he was fifteen years old, and both he and Luis were members of the Latin Kings street gang. However, Carlos denied that either he or Luis possessed or displayed any weapons at the time of the shooting. On cross-examination, Carlos testified that Two-Six was a rival gang of the Latin Kings. Defense counsel then impeached Carlos with his grand jury testimony, in which Carlos had testified that he was not a member of a street gang. At trial, upon impeachment, Carlos admitted that that portion of his grand jury testimony was untrue. On redirect examination, Carlos clarified that he quit the Latin Kings on November 12, 2006, and thus, was no longer a gang member as of his grand jury testimony on November 28, 2006. The parties then stipulated that on November 11, 2006, Carlos viewed a police lineup that contained the defendant, but was unable to identify anyone as the shooter.

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¶ 8 Melissa Molina (Melissa) testified that at approximately 6:50 p.m. on November 9, 2006, she and her two sisters were walking on 30th Street toward Christiana Avenue, when a black car carrying two Hispanic females in the front seats and one Hispanic male in the backseat approached from behind, slowed, and suddenly stopped. The female sitting in the front passenger seat of the car partly leaned out of the window and stared at Melissa and her sisters. The car then drove away and headed north on Spaulding Avenue, while Melissa and her sisters headed home on Christiana Avenue. Thereafter, Melissa heard gunshots near her home, at which point she ran toward her house and observed the same black vehicle speeding westbound on 28th Street near the corner of 28th Street and Christiana Avenue. The trial testimony of Stephanie Velez (Stephanie), one of Melissa's sisters, substantially paralleled the testimony of Melissa.

¶ 9 Officer Timothy Finley (Officer Finley) testified that he was an officer in the "gang team" of the Chicago police department in 2006 and 2007. He was specifically familiar with the Latin Kings and the Two-Six rival street gangs. On November 9, 2006, Officer Finley was on duty with his partner, Jeremy Sneider (Officer Sneider), when they received a police radio call about a person being shot on 28th Street between Spaulding and Christiana Avenues. The radio message described the vehicle involved in the shooting as a black four-door car driven by a Hispanic female and traveling westbound on 28th Street. Officer Finley recognized the location as Latin Kings territory. Officer Finley testified that he and Officer Sneider discussed that if a Latin Kings gang member was shot, a member of the rival gang—Two-Six—was likely the culprit. As a result, Officers Finley and Sneider drove southbound on Pulaski Road toward Two-Six territory. At the intersection of 28th Street and Pulaski Road, Officer Finley observed a black four-door vehicle traveling westbound on 28th Street which matched the radio description of the suspect's car. A male passenger who was seated in the backseat of the car looked over the

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back car window and suddenly crouched down in the backseat so that the officers could no longer see him. The officers then stopped the vehicle, and Officer Finley observed two female individuals seated in the front seats and a male individual seated in the backseat of the car, whom Officer Finley identified at trial as the defendant. Officer Finley also learned the name of the driver as Abigail Ruiz and the name of the front passenger as Paulette Vaca. The trio then agreed to go to the police station and speak with detectives.

¶ 10 Abigail Ruiz (Abigail) testified that in November 2006, she was friends with Paulette Vaca (Paulette), who was the defendant's girlfriend at the time. On November 9, 2006, Abigail drove to pick Paulette up at the defendant's home. Upon arriving at the defendant's home, the defendant indicated his desire to come with them. The defendant sat in the backseat of Abigail's car, while Paulette sat in the front passenger seat and Abigail drove. Abigail described her vehicle as a black four-door Pontiac. While enroute to Abigail's house, the defendant wanted to see "who [was] out because he wanted to get some weed." The defendant directed Abigail to stop at an alley on Avers Avenue, where the defendant exited the car, and later returned and reentered Abigail's car. Abigail did not remember seeing anything in the defendant's hand after he reentered her vehicle. The trio headed westbound on 28th Street, where Abigail observed two young men standing near the corner of 28th Street and Spaulding Avenue. As the trio approached an alley, one of the two young men standing on the street corner walked towards Abigail's vehicle, however, Abigail could not drive away because "there was a lot of traffic." Abigail then heard gunshots from the backseat of her car, and, at that moment, a car that had stopped in front of Abigail's car moved and Abigail was able to drive away. Abigail testified that she did not see the gun while it was being fired. After the shooting, they returned to the alley on Avers Avenue, where the defendant again exited Abigail's car and later returned and

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reentered the vehicle. Abigail did not remember seeing a gun in the defendant's hand as he exited the car at that time. Thereafter, Abigail, Paulette and the defendant continued driving westbound, after which police officers stopped her car near the intersection of 30th Street and Pulaski Road and the trio were taken to the police station. At trial, Abigail acknowledged that she testified in her grand jury testimony that the defendant had a gun in his hand when he reentered the vehicle after the first time they stopped in the alley on Avers Avenue, that she did not observe anything in the two young men's hands at the time the defendant fired the gunshots at them, that she observed the defendant firing the weapon inside her car, and that the defendant was a member of the Two-Six<sup>1</sup> street gang at the time of the shooting. On cross-examination, Abigail testified that she only stopped near the two young men because there was a stop sign and the car in front of Abigail's vehicle was stopped. She stated that the only time she was aware that the defendant possessed a gun was when she heard the gunshots. Abigail testified that she believed that the defendant was getting marijuana when he first exited the car in the alley on Avers Avenue, and that the defendant said "let's see who is out" while the trio drove around prior to the shooting. On the day of the shooting, Abigail neither saw the defendant or the two young men use any gang signs at one another, nor did the defendant refer to the name of any street gangs. After the shots were fired, the defendant told Abigail to "go" even though she was unable to do so because the car in front of her vehicle had stopped. By stipulations, the parties agreed that on November 14, 2006, Abigail testified before a grand jury that prior to the shooting, the trio drove around looking for one of the defendant's friends. Abigail testified at the grand jury hearing that it was her understanding that she would drop the defendant off once they

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<sup>1</sup> The record varies as to the name of this street gang – "Two-Six" or "Two-Sixers." For consistency, we refer to this gang as "Two-Six."

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located his friend; however, they did not locate anyone that the defendant acknowledged as a friend. Abigail also testified before the grand jury that the defendant told her that he needed to "pick something up" when he exited the car the first time and that he returned to the car with a gun.

¶ 11 Detective Carlos Cortez (Detective Cortez) testified that on November 9, 2006, he received an assignment about a person shot at 3318 West 28th Street in Chicago. Detective Cortez and Detective Sandoval responded to the scene and discovered the victim, Luis, lying on the sidewalk. Detective Cortez observed blood on the sidewalk near the victim, as well as a black pen, a chrome-colored butterfly knife that was closed, and a bottle of Visine eyedrops. A fired bullet was also found several feet away in a nearby alley. Detective Cortez then spoke with several witnesses, including Melissa and Stephanie, at the scene. Later at the police station, Detective Cortez spoke with Abigail, who had been detained by other police officers. Based on his conversation with Abigail, Detective Cortez, along with several other detectives and Abigail, went to an alley located at 2850 South Avers Avenue, where the detectives discovered a handgun in the rear enclosed porch on the outside of the building. Evidence technicians then arrived to recover the handgun, along with several live ammunition cartridges. On the front of a garage located at 2850 South Avers Avenue was graffiti depicting an upside down crown—indicating disrespect for the Latin Kings gang—and an "A" and "31" to indicate Avers Avenue and 31st Street, which was a faction of the Two-Six street gang. On cross-examination, Detective Cortez testified that it was not until Luis' body was removed from the crime scene that he could see the butterfly knife and the bottle of Visine eyedrops. The butterfly knife was located no more than two feet from the bloodstains on the sidewalk. Detective Cortez noted that the butterfly knife

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was in a closed, but unlocked, position when it was recovered. In Detective Cortez's opinion, the length of the knife blade was too long to be legally possessed by a person.

¶ 12 The State then presented evidence that a gunshot residue (GSR) test performed on the defendant's hands showed to a reasonable degree of scientific certainty that the defendant had discharged a firearm or had both hands in the environment of a discharged firearm. Evidence was also presented at trial that ballistics tests showed that the bullets recovered from Luis's body and the crime scene were fired from the handgun that the police recovered from the alley at 2850 South Avers Avenue. The State further presented evidence that forensics tests showed that the defendant could not be excluded from contributing to the mixture of DNA profiles that were taken from swabs of the handgun.

¶ 13 Assistant Medical Examiner Ponni Arunkumar (Dr. Arunkumar) testified that she performed an autopsy on Luis' body in November 2006. She found two gunshot wounds on his body. The first gunshot wound was located on Luis's left, upper back along the posterior axillary line, and involved the left lung and aorta. An examination of the first gunshot wound revealed no evidence of close-range firing, which Dr. Arunkumar defined as shooting from a distance of 18 inches or less. Dr. Arunkumar found the second gunshot wound about seven inches to the left of his back's midline, which injured his left and right lungs, right chest wall, and right arm. Dr. Arunkumar found no evidence of close-range firing from the second gunshot wound.

¶ 14 Detective Patrick O'Donovan (Detective O'Donovan) testified that at 11 a.m. on November 10, 2006, he and Detective Sandoval interviewed the defendant at the police station. At that point at trial, the State introduced a DVD in court containing the defendant's videotaped statements to the police, which was then admitted into evidence and played for the jury. After the videotaped statement was published to the jury, Detective O'Donovan testified that during the

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interview, the defendant informed the detectives that neither Abigail nor his girlfriend, Paulette, knew he possessed a firearm or that he was going to shoot anyone. The defendant informed the detectives that, on November 9, 2006, he was seated as a backseat passenger in a car driven by Abigail and occupied by Paulette in the front. As the trio drove westbound on 28th Street, he observed two young men, whom he believed were members of the Latin Kings street gang, standing by an alley on the south side of the street. The defendant told the detectives that the two young men said, "what's up? What's up?" to the defendant, and that they did not expect to be shot at by the defendant. The State questioned Detective O'Donovan regarding certain portions of the videotaped statement, including what the defendant told the detectives regarding the back passenger window of the car and the meaning behind certain motions the defendant had made with his right hand as depicted on the DVD. In response, Detective O'Donovan testified that the defendant described how he had rolled down the window before shooting from the backseat of the vehicle, and that the defendant verbally and physically demonstrated to the detectives "how he held the handgun and motions he had to go through to aim the handgun towards those two subjects as the vehicle he was in was traveling away from the subjects" and how the defendant had to "turn his body to actually continue aiming at those two individuals." Detective O'Donovan testified that the defendant told him that he was a member of the Two-Six street gang, and that he had personal reasons for disliking the Latin Kings gang—namely, the defendant's friend, Fabian, had been killed by individuals whom the defendant believed to be members of the Latin Kings street gang; and that the defendant had been shot by members of this rival gang in the past. The defendant informed the detectives that he did not see the young men display any weapons, that no one in Abigail's car was being shot at by the two young men, and that he had returned the handgun to its hiding place by the time he was stopped by the police.

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On cross-examination, Detective O'Donovan stated that his testimony was a paraphrase of what the defendant told him during police interrogation on November 10, 2006. He testified that the totality of the videotaped statement was reflected in his notes and case reports that were completed in connection with the incident. He stated that, with regard to the depiction of the defendant gesturing with his hands towards his waist on the videotaped statement, the defendant informed him that the two young men were making gang signs at the defendant but the defendant did not see a gun in their possession. Detective O'Donovan testified that the defendant made clear during the police interview that he traveled to Latin Kings territory while armed with a firearm and that he had directed Abigail where to drive. However, the defendant never informed the detectives that he was in Latin Kings territory with the plan to shoot at the two young men on November 9, 2006.

¶ 15 The State then rested its case-in-chief, and the defense introduced testimonial evidence from Paulette and the defendant. Paulette testified for the defense that she was the defendant's girlfriend in 2006. On November 9, 2006, at approximately 6:30 p.m., Abigail came to pick Paulette up at the defendant's home. The defendant decided to join them at the last minute and rode in the backseat of Abigail's car, while Paulette sat in the front passenger seat. The trio drove to the home of the defendant's friend; however, they could not locate the friend. They then drove around looking for marijuana. According to Paulette, the defendant stated that he wanted to "go see who's out," but that he did not direct Abigail where to drive. During the car ride, the defendant did not mention anything about the Latin Kings, nor did Paulette see him in possession of a gun from the time he left his house until the time gunshots were fired. Prior to the shooting, Paulette observed two men standing on a street corner, one of whom approached Abigail's vehicle while reaching toward his waist. Paulette explained that Abigail's car had stopped by

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this time because a vehicle in front of them had stopped. Paulette then heard gunshots from the backseat of Abigail's car. Neither the individual who approached their vehicle nor the defendant said anything before the defendant fired the gun. After the shooting, the car in front of Abigail's car moved and the trio drove away. The defendant then directed Abigail to drive to an alley, where the defendant exited the vehicle and later returned. Paulette noted that the trio had stopped at the same alley prior to the shooting, but that she did not know why. On cross-examination, Paulette testified that, after the shooting, she refused to tell the police what she had observed.

¶ 16 The defendant testified that on the evening of November 9, 2006, he, Paulette and Abigail drove to the "26th area" looking for his friends and some marijuana. They stopped at 2850 South Avers Avenue to look for one of his friends, who was not home. Instead, the defendant took a gun from that location, which he tucked into his waistband. At that time, he was in the Two-Six street gang, which did not get along well with the Latin Kings street gang. The defendant denied that the gun belonged to his gang, and stated that he obtained the gun because he was "in fear of [his] life all the time." Subsequently, while driving in the car, the defendant observed two people standing in an alley on 28th Street between Spaulding and Christiana Avenues. The two individuals, who stood about 10 feet from Abigail's stopped car, looked like they were out to look for trouble. One of the individuals approached their car, made gang signs, and reached toward his belt buckle. The defendant could not see the individual's hands, nor did he see a weapon on the individual. However, based on the individual's continued movements, the defendant feared for his own life. The defendant never told the individual to back away, even though the individual came within five feet of Abigail's vehicle. At that point, the defendant fired his handgun three times towards the left, while turning his head in the

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opposite direction. The defendant testified that he watched his videotaped statement to the police in which he demonstrated the movement of turning his head to the right, while holding both of his hands toward the left. He clarified that, during that portion of the police interview, he was actually telling the detectives that he turned his head in the opposite direction at the time of the shooting because he was scared that the individual was going to shoot him. The defendant explained that he fired the gun three times because he wanted to "scare him off, move him away from my car." After the shooting, the defendant directed Abigail to return to 2850 South Avers Avenue, where he discarded the gun. Thereafter, police officers stopped Abigail's vehicle and the defendant was taken into custody. At trial, the defendant stated that there were parts of his videotaped statement that he could not understand. With regard to the portions of the videotaped statement in which the defendant was seen putting his hands to his waist, the defendant explained at trial that he was actually telling the detectives that he feared for his life when the individual approached Abigail's vehicle with his hands placed towards his waist. On cross-examination, the defendant stated that he knew the gun was loaded at the time he picked it up from the location on Avers Avenue, and that the trio drove around Latin Kings territory to purchase marijuana. He denied ever telling the detectives that one of the two individuals had approached Abigail's car at the time of the shooting.

¶ 17 In rebuttal, Detective O'Donovan testified that, during the police interview with the defendant on November 10, 2006, the defendant never told the detectives that he turned his head in an opposite direction while he fired the handgun. Rather, the defendant actually demonstrated for the detectives how his head and arms all pointed in the same direction "as he had to turn his body to fire at the two individuals." Detective O'Donovan stated that the defendant never informed him that the defendant feared for his own life.

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¶ 18 Following closing arguments, the jury found the defendant guilty of first-degree murder and aggravated discharge of a firearm. The jury also found that the defendant, in the commission of first-degree murder, personally discharged a firearm that proximately caused death of another person.

¶ 19 On September 13, 2010, the defendant filed a motion for a new trial, which was subsequently amended twice. On April 26, 2011, the trial court denied the defendant's second amended motion for a new trial and sentenced him to consecutive terms of 55 years of imprisonment for first-degree murder and 10 years of imprisonment for aggravated discharge of a firearm, for a total of 65 years of imprisonment. On May 13, 2011, the defendant's motion to reconsider sentence was denied.

¶ 20 On May 13, 2011, the defendant filed a timely notice of appeal.

¶ 21 ANALYSIS

¶ 22 We determine the following issues on appeal: (1) whether the trial court erred in denying the defendant's motion *in limine* to bar his videotaped statement to the police; (2) whether the trial court erred in allowing the State to elicit Paulette's trial testimony regarding why she had initially withheld information concerning the crime from the police; and (3) whether defense counsel provided ineffective assistance of counsel.

¶ 23 We first determine whether the trial court erred in denying the defendant's motion *in limine* to bar his videotaped statement to the police. The admissibility of evidence is within the sound discretion of the trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010). An abuse of discretion occurs where the trial court's decision is arbitrary, fanciful or unreasonable, or where no reasonable person would agree with the position adopted by the trial court. *Id.*

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¶ 24 The defendant argues that the trial court abused its discretion in allowing the jury to view his videotaped statement to the police, where the videotape was largely inaudible and thus, was an unreliable and misleading representation of his custodial statement. He contends that the admission of the videotaped statement at trial was prejudicial to him because it permitted Detective O'Donovan to testify as to his interpretations of the defendant's gestures and the inaudible parts of the videotaped statement, which lent undue credibility to the detective, as well as allowed the State to undermine his claim of self-defense during its closing argument.

¶ 25 The State counters that the trial court did not abuse its discretion in admitting the videotaped statement at trial because the videotape was only partially inaudible, and the court correctly found that the videotaped statement showed the demeanor of the defendant and the detectives during interrogation, that playing the videotape could work against the State depending on the viewpoint of the triers of fact, and that the inaudible portions affected only the weight and not the admissibility of the statement. The State further contends that, even if the admissibility of the videotaped statement was an abuse of discretion, it was harmless in light of the overwhelming evidence of the defendant's guilt.

¶ 26 " 'A partially inaudible sound recording is admissible unless the inaudible portions are so substantial as to render the recording untrustworthy as a whole.' " *People v. Hunt*, 234 Ill. 2d 49, 66 (2009) (quoting *People v. Manning*, 182 Ill. 2d 193 (1998)). In *Hunt*, our supreme court held that audio recordings of the defendant's incriminating statements were substantially inaudible and thus, affirmed the appellate court's suppression of the recordings as conversations that could not be understood. *Hunt*, 234 Ill. 2d at 66. We have watched the videotaped statement at issue in this case, and conclude that the videotape was largely inaudible and that the bulk of the conversation between the detectives and the defendant was indecipherable. Indeed, at the

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hearing on the defendant's motion *in limine*, the trial court found that many portions of the videotaped statement were inaudible. Notwithstanding the inaudibility of the videotaped statement, the trial court allowed the videotape to be admitted and published to the jury, on the bases that some parts were audible; that it showed the demeanor of the police and the defendant during their conversation; that playing the videotape "could work against the State or not depending on the viewpoint of the triers of fact"; and that it showed the defendant's behavior in changing his mind several times as to whether to speak with the police *prior* to giving the statement in question.

¶ 27 Based on our examination of the videotaped statement, this court was able to decipher with clarity and certainty at most 10 words in the entirety of the more than 20-minute conversation between the detectives and the defendant. Although certain words were audible, the context surrounding these audible words was not clear and thus, the meaning behind them could not be ascertained or understood. In allowing the videotaped statement to be admitted and published to the jury, the trial court found that it was relevant to show that, *prior* to giving the statement in question, the defendant changed his mind several times as to whether to speak with the police. We disagree and find that the evidence did not support the court's ruling on this basis. The record shows that none of the defendant's recorded behavior *prior* to his giving of the custodial statement at issue was shown to the jury; thus, it could not be concluded that such evidence bore any relevance as to whether the videotaped statement should have been admitted. Rather, the only portion of the videotape that was played for the jury involved the custodial statement at issue, which the defendant provided to the detectives *after* he waived his right to remain silent. While the videotaped statement visually showed the physical demeanor of the detectives and the defendant during interrogation, such evidence only demonstrated the lack of

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any physical coercion of the defendant, but did not shed any light upon the precise content of the police interrogation as a result of the largely inaudible quality of the videotape. Further, we find that the trial court's reasoning that the admission of the videotaped statement "could work against the State or not depending on the viewpoint of the triers of fact," only served to highlight the ambiguity of the videotaped statement. Accordingly, we find that the trial court abused its discretion in admitting the videotaped statement, which was largely inaudible.

¶ 28 The State argues for the admission of the videotaped statement at trial, and relies on the holding in *Manning*. We find *Manning* to be distinguishable from the case at bar. In *Manning*, our supreme court held that two inaudible gaps in a recording of a conversation between the defendant and an informant was not so substantial as to render the recording untrustworthy as a whole, where the jury was provided excerpts from the transcripts of the recording and the jury heard the recording. *Manning*, 182 Ill. 2d at 212. Unlike *Manning*, as we have discussed, the videotaped statement in the instant case contained mainly inaudible dialogue between the detectives and the defendant. The few audible words that could be deciphered from the videotape could not be put into their proper context. Further, the trial court itself found that the transcripts of the videotaped statement were inaccurate, and therefore did not provide the jury with transcripts of the statement. Because the inaudible portions were so substantial as to render the recording untrustworthy as a whole, we cannot conclude that any reasonable person would agree with the position adopted by the trial court. Thus, we hold that the trial court abused its discretion in admitting the videotaped statement at trial.

¶ 29 The defendant argues that he was prejudiced by the court's error in admitting the videotaped statement at trial because it permitted Detective O'Donovan to testify as to his interpretations of the defendant's gestures and the inaudible parts of the videotape statement,

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which lent undue credibility to the detective, as well as allowed the State to undermine his claim of self-defense during its closing argument. The State asserts that the error was harmless in light of the overwhelming evidence of the defendant's guilt.

¶ 30 Based on our review of the record, we find that the defendant was not prejudiced by the admission of the videotaped statement at trial. The State elicited evidence during Detective O'Donovan's testimony regarding certain portions of the videotaped statement, including testimony that the defendant gestured toward his waist in describing how he reached toward his own waistband immediately prior to the shooting and that the defendant physically demonstrated how he held and aimed the handgun toward the two victims. However, the defendant chose to take the stand at trial and likewise had the opportunity to testify as to his gestures and interpretations of certain portions of the videotaped statement. In his testimony, the defendant explained that, during the portions of the videotaped statement in which he was seen putting his hands to his waist, he was actually telling the detectives that the individual who approached Abigail's vehicle had placed his hands on his own waist. The defendant also testified to his interpretations of other gestures he made during the videotaped interview, by clarifying that he demonstrated the movement of turning his head to the right because he was actually telling the detectives that he had turned his head, as an act of self-defense, in the opposite direction from the direction he was shooting. Thus, the State and the defense, through witness testimony, each provided their interpretation of the content of the inaudible parts of the videotaped statement. As is customary where there is conflicting testimony in a trial, the jury was free to determine which version of the evidence to believe and to weigh the evidence presented. See *People v. Ward*, 2011 IL 108690, ¶ 34 (the jury's function is to assess the credibility of the witnesses, weigh the evidence presented, resolve conflicts in the evidence, and draw reasonable inferences from the

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evidence). Therefore, despite our holding that the trial court abused its discretion in admitting the videotaped statement at trial, such error was not reversible because it did not prejudice the defendant.

¶ 31 We further reject the defendant's argument that the State's closing argument exacerbated the court's error in admitting the videotaped statement at trial. The defendant argues that the admission of the videotaped statement allowed the State to undermine his claim of self-defense during its closing argument. Specifically, the defendant contends that the State emphasized a portion of the videotaped statement in which the defendant stated that "they didn't expect it," as a way to undermine his claim of self-defense. The defendant argues that "they" referred to Paulette and Abigail in that they did not expect there to be a shooting, rather than an indication that the victims, Carlos and Luis, did not expect the defendant to shoot at them. We reject this contention as being without merit. First, the complained-of comments were within the wide latitude allowed the State in closing arguments, where they were based on evidence presented during its case-in-chief. See *People v. Jackson*, 182 Ill. 2d 30, 82 (1998). Second, even if the complained-of phrase referred to Carlos and Luis in that they did not expect the defendant to shoot at them, we find that this did nothing to undermine the defense's theory that the defendant shot in self-defense or that the two victims threatened him with harm first. The defendant further argues that the erroneous admission of the videotaped statement allowed the State to use the inaudible parts of the videotape to unfairly attack this theory of self-defense—namely, to argue in closing that the defendant's claim of self-defense was impeached by his failure to tell the police in the videotaped statement that he had felt threatened prior to the shooting. We likewise reject this contention. The defendant testified at trial that he had in fact informed the detectives during police interrogation that he turned his head in the opposite direction at the time of the

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shooting because he was scared that the individual was going to shoot him. The jury heard this testimony, along with the State's evidence and arguments, in determining whether to accept or reject the defendant's claim of self-defense. They clearly decided to reject it and nothing in the record suggests that they acted unreasonably. Thus, we find that the defendant was not prejudiced by the admission of the videotaped statement at trial.

¶ 32 Even in the absence of the videotaped statement at trial, evidence presented allowed the jury to reasonably conclude that the defendant did not act in self-defense. Evidence was presented at trial that the defendant retrieved a handgun at 2850 South Avers Avenue prior to the shooting, that the defendant and his companions drove into rival gang territory, that the defendant had personal reasons for disliking the Latin Kings gang, that the defendant shot at Carlos and Luis, and that, after the shooting, the defendant discarded the handgun at the same location on Avers Avenue from which he had retrieved it. While a butterfly knife was found at the crime scene, Detective O'Donovan testified that he could not "associate it with anyone or anything," and Detective Cortez testified that the knife was in a closed position when the police recovered it. The jury also heard Dr. Arunkumar testify that Luis suffered two gunshot wounds to his back and that there was no evidence of close-range firing—from which the jury could reasonably infer that the defendant shot Luis while Luis was fleeing. Detective O'Donovan also testified at trial that the entirety of the content of the videotaped statement was reflected in his notes and case reports that were completed in connection with the incident, which he reviewed in preparation for trial. Thus, based on the more than sufficient evidence presented at trial, we hold that the admission of the videotaped statement at trial was harmless error.

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¶ 33 We next determine whether the trial court erred in allowing the State to elicit Paulette's trial testimony regarding why she had initially withheld information concerning the crime from the police.

¶ 34 The defendant argues that the trial court erred in allowing the State to elicit testimony from Paulette that, after the shooting, she had refused to tell the police what she had observed. While the defendant concedes that he lacked standing to complain of violations of another person's constitutional rights, he contends, citing *People v. Homes*, 274 Ill. App. 3d 612 (1995), that Paulette's refusal to talk to the police was not material or probative as to the credibility of her trial testimony concerning how one of the individuals approached Abigail's car and reached toward his waist at the time the defendant fired his handgun. The defendant argues that, because Paulette's testimony corroborated the defendant's claim of self-defense and was thus crucial evidence, he was prejudiced by the trial court's error in allowing the State to elicit testimony that Paulette refused to talk to the police because it suggested to the jury that Paulette's testimony was not credible. He further claims that the cumulative errors of admitting the videotaped statement and allowing the State to impeach Paulette with her silence following the shooting required reversal of his conviction.

¶ 35 The State counters that the defendant forfeited review of this issue on appeal where he failed to raise it in his posttrial motions. The State contends that the plain error doctrine was inapplicable where the defendant could not establish that any error occurred because the trial court properly exercised its discretion in allowing the State to ask Paulette about why she had waited until trial to tell her story about an individual who approached Abigail's car while reaching toward his waist area. The State maintains that, even if an error occurred, the error was

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not so serious as to deny the defendant a substantial right, nor was the evidence so closely balanced that the jury's guilty verdict may have resulted from the error.

¶ 36 At trial, Paulette testified on direct examination that, prior to the shooting, she observed one of the two individuals approach Abigail's vehicle while reaching toward his waist. On cross-examination, the State elicited the following testimony from Paulette:

"Q: [Paulette], on November 9, 2006, after your boyfriend just shot someone, did you tell the police what you had seen?

A: No.

Q: In fact, you refused to talk to the police?

A: Yes.

Q: And now you're telling the ladies and gentlemen that one of the guys started walking towards your car, is that right?

A: Yes."

The defendant challenges the admission of the quoted testimony. However, we find that the defendant has forfeited review of this issue on appeal, where he failed to raise it in his second amended motion for a new trial. See *People v. Herron*, 215 Ill. 2d 167 (2005) (a defendant who fails to make a timely trial objection and include the issue in a posttrial motion forfeits review of the issue). Under the plain error doctrine, a reviewing court may consider unpreserved issues when either: (1) the evidence is so closely balanced, regardless of the seriousness of the error, that the jury's verdict may have resulted from the error and not the evidence; or (2) the error is so serious, regardless of the closeness of the evidence, as to affect the fairness of the defendant's trial. *People v. McLaurin*, 235 Ill. 2d 478, 489 (2009). The first step in a plain error analysis is to determine whether an error occurred at all. *Id.*

¶ 37 It is well-established that the constitutional privilege against self-incrimination is a personal privilege belonging only to the person testifying. *People v. Adams*, 283 Ill. App. 3d 520, 524 (1996). The defendant concedes that he lacks standing to vicariously assert Paulette's constitutional right against self-incrimination and thus, cannot now challenge the court's decision in allowing the State to elicit testimony from Paulette that she invoked her right to remain silent after the shooting. See *id.* Moreover, as discussed, Paulette, as the defendant's girlfriend at the time of the shooting, testified on direct examination that one of the individuals approached Abigail's vehicle and reached for his waist when she heard the gunshots. We find that the trial court properly exercised its discretion in allowing the State to question Paulette on cross-examination about why she waited until trial to tell about the individual who reached toward his waist as he approached the vehicle prior to the shooting. See *People v. Andras*, 241 Ill. App. 3d 28, 43 (1992) ("where a witness is a friend of the accused and had knowledge of the friend's arrest, evidence that the witness failed to give exculpatory information is admissible to impeach the witness").

¶ 38 Nonetheless, the defendant contends that the admission of the testimony in question was erroneous, and cites *Homes*, 274 Ill. App. 3d 612, for support. In *Homes*, the defendant was charged with, *inter alia*, attempted first-degree murder after a drive-by shooting. *Id.* at 614. The defendant's juvenile brother, Corey, was in custody as a suspect in the shooting. *Id.* at 615. At the defendant's bench trial, Corey testified that he was alone in the car when he fired shots at passers-by. *Id.* at 616. On cross-examination, Corey testified that he was arrested for the shooting and that while in custody, he learned that the defendant had also been arrested for the shooting, but did not tell the police officers that the defendant was not involved. *Id.* The trial court found the defendant guilty of attempted first-degree murder, finding that he, not Corey, had

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fired the gun. *Id.* at 617. On appeal, the *Homes* court found that the trial court erred in permitting the State to use Corey's post-arrest silence for impeachment purposes. *Id.* at 620. The *Homes* court reasoned that, although there was no constitutional violation in using Corey's post-arrest silence, it was not "sufficiently inconsistent" with his trial testimony to be used as a prior inconsistent statement. *Id.* Because there were many reasons, including a possible reliance on his constitutional privileges, as to why Corey would not tell the police that the defendant was not involved in the shooting, the *Homes* court found Corey's post-arrest silence to be "so ambiguous" that it was error to permit its use on cross-examination. *Id.* at 620-21. The *Homes* court concluded that, although it is appropriate for the State to cross-examine alibi witnesses who are the defendant's friends and family members regarding their failure to come forward with information about the defendant's alibi, "that principle does not apply to the use of a witness' post-arrest silence as impeachment." *Id.* at 620. However, the court found that the error of admitting Corey's post-arrest silence was harmless, where the evidence against the defendant was overwhelming. *Id.* at 621.

¶ 39 We find *Homes* to be distinguishable from the facts of the instant case. Here, no evidence was presented at trial that Paulette was arrested or charged with any crimes. At trial,<sup>2</sup> Officer Finley testified that Abigail, Paulette and the defendant agreed to go to the police station and speak with the detectives after they were stopped by the police. Although Paulette testified that she was placed in a locked room alone at the police station and that she thought she was in

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<sup>2</sup> In his reply brief, the defendant points to Detective Sandoval's testimony at the defendant's pretrial hearing on the motion to suppress, in which he stated that Paulette was "in custody" after the shooting. However, Detective Sandoval did not testify at trial and thus, this information was not made available to the jury.

trouble, there was no indication that Paulette had been formally placed under arrest for the shooting. Thus, we find that the trial court did not commit error in allowing the State to elicit testimony on cross-examination from Paulette regarding her silence after the shooting, where Paulette was not an arrestee at that time and could not be said to have kept quiet for the sake of exercising her constitutional privileges against self-incrimination. We further find the defendant's reliance on *People v. Quinonez*, 2011 IL App (1st) 092333, to be misplaced. *Quinonez* concerned the State's improper cross-examination at trial regarding the defendant's own post-arrest silence. *Id.* ¶¶ 31, 38. Unlike *Quinonez*, in the case at bar, the State made no attempt to cross-examine the defendant about his own post-arrest silence.

¶ 40 Accordingly, because the defendant cannot establish that an error occurred, we hold that the plain error doctrine is inapplicable to reach this forfeited issue. Even assuming, *arguendo*, that it was error for the State to cross-examine Paulette about her initial silence to the police, we find that such error did not rise to the level of plain error because the error was not so serious as to deny the defendant a fair trial, nor was the evidence at trial so closely balanced that the jury's verdict may have resulted from the error and not the evidence. Moreover, in light of our holding that no error occurred, we reject the defendant's arguments regarding cumulative error.

¶ 41 We next determine whether defense counsel provided ineffective assistance of counsel.

¶ 42 The defendant argues that defense counsel provided ineffective assistance in eliciting opinion testimony from Detective O'Donovan regarding the defendant's intent to shoot at gang members and in failing to tender a limiting instruction regarding gang evidence to the jury.

¶ 43 The State counters that the defendant received effective assistance of counsel. Specifically, the State maintains that eliciting Detective O'Donovan's testimony in question and choosing not to tender a limiting instruction regarding gang evidence to the jury were valid trial

strategies. The State contends that, even if defense counsel's performance was deficient, the defendant has failed to show that he was prejudiced by defense counsel's actions or inactions.

¶ 44 To prevail on a claim of ineffective assistance of counsel, the defendant: (1) must prove that counsel's performance fell below an objective standard of reasonableness so as to deprive him of the right to counsel under the sixth amendment (performance prong); and (2) that this substandard performance resulted in prejudice (prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). To establish the performance prong, the defendant must overcome a strong presumption that, under the circumstances, the challenged action or inaction was sound trial strategy. *People v. Lopez*, 371 Ill. App. 3d 920, 929 (2007). Because effective assistance of counsel refers to competent, not perfect, representation, "matters relating to trial strategy are generally immune from claims of ineffective assistance of counsel." *Id.* at 929. Further, in determining the adequacy of counsel's representation, "a reviewing court will not consider isolated instances of misconduct, but rather the totality of the circumstances." *Id.* To establish prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *People v. King*, 316 Ill. App. 3d 901, 913 (2000). A reasonable probability is one that sufficiently undermines confidence in the outcome. *Id.* The defendant must satisfy both prongs to prevail on his claim of ineffective assistance of counsel. However, a reviewing court may analyze the facts of the case under either prong first, and if it deems that the standard for that prong is not satisfied, it need not consider the other prong. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 45 The defendant argues that defense counsel was ineffective for providing support to the State's theory that the defendant armed himself and proceeded to rival gang territory with the

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intention of shooting a rival gang member, by eliciting the following testimony from Detective O'Donovan during cross-examination:

"Q: Did [defendant] ever say that he planned on shooting at somebody when he got over there or did he just tell you that he was armed and he was over where the [Latin] Kings were at or their neighborhood?

\* \* \*

A: I would have to answer it by saying that in my 28 years of police experience, I've worked my entire career in or around that portion of the tenth police district and for those 28 years, I have dealt with the Latin Kings and [Two-Six] Violent Lords, as it were. During that time, I have never come across either Latin Kings or [Two-Six] street gang member that just armed themselves with a firearm, traveled to and traveled deep into rival gang territory just to look around.

Q: So you believe at the time you were talking to him that because he was armed and because he was a [Two-Sixer] and because he was east of Ridgeway that he must have been over there to shoot somebody?

A: Based on my 28 years of police experience, yes, I thought that was a very safe assumption on my part."

The defendant highlights defense counsel's question as to Detective O'Donovan's belief regarding the defendant's intent, arguing that it served to elicit the detective's improper opinion

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testimony that the defendant entered rival gang territory with the intent of shooting at rival gang members.

¶ 46 Based on our review of the entirety of the line of questioning in context, we find that, in asking about Detective O'Donovan's *assumption* that the defendant was a gang member who armed himself before driving through rival gang territory with the intent to cause harm, defense counsel's valid strategy was to show the jury that the defendant had in fact never told the police about planning to shoot anyone. This was evidenced by the first question quoted above, as well as a follow-up question posed by defense counsel, in which he asked, "would you agree that he never uttered the words that he had planned on doing what he did, never said those specific words?" In response, Detective O'Donovan admitted that the defendant never told him that the defendant obtained a handgun and traveled into gang territory with the intent of shooting anyone, which showed that it was merely an assumption that the detective had made based on events unrelated to the defendant and which bolstered the defendant's self-defense theory. We further find the defendant's reliance on *People v. Bailey*, 374 Ill. App. 3d 608 (2007) to be misplaced, where, in *Bailey*, defense counsel provided ineffective assistance of counsel for eliciting cross-examination testimony from a police officer that proved an element of the offense the State had not otherwise established as part of its case, and the defendant was prejudiced by the admission of the evidence. *Bailey*, 374 Ill. App. 3d at 614-15. Unlike *Bailey*, the line of questioning at issue did not prove an element of the charged offenses, nor did it negate any of the elements of self-defense. See *People v. Lee*, 213 Ill. 2d 218, 225 (2008) (listing the elements of self-defense). Thus, we find that the defendant has not overcome the strong presumption that defense counsel's action was sound trial strategy. See *Lopez*, 371 Ill. App. 3d at 929.

¶ 47 The defendant further argues that defense counsel was deficient for failing to tender a limiting instruction regarding gang evidence to the jury. He contends that because gang-related evidence was presented at trial, defense counsel's failure to request a limiting instruction on such evidence presented a danger of the jury convicting the defendant based on his gang affiliation alone. The State counters that it was valid trial strategy for defense counsel not to ask for an instruction on gang evidence, where the defendant's theory of self-defense hinged on the jury believing that the victim was a menacing rival gang member bent on harming the defendant.

¶ 48 The defendant does not dispute that gang evidence was properly admitted at trial, but only that defense counsel should have tendered a limiting instruction in order to guide the jury's consideration of the evidence. We agree with the defendant that it was error for defense counsel not to have tendered a limiting instruction for the jury on the use of the gang evidence. See *People v. Campbell*, 2012 IL App (1st) 101249, ¶¶ 31-35 (finding error, *albeit* harmless error, in trial court's failure to provide jury with limiting instruction on gang evidence; finding that defendant was not denied effective assistance of counsel where counsel's failure to request a special jury instruction on gang evidence did not prejudice defendant); *People v. Jackson*, 357 Ill. App. 3d 313 (2005) (finding error, though harmless error, in the court's failure to instruct the jury that gang evidence should only have been considered for the limited purpose of showing defendant's identification, presence, intent, motive, design, or knowledge); see *People v. Hooker*, 253 Ill. App. 3d 1075, 1085 (1993) (failure of an attorney to seek a limiting instruction when he is entitled to one is not a matter of discretion or trial strategy). Even if, as the State suggests, the defendant's theory of self-defense hinged on the jury believing that the victim was a menacing rival gang member bent on harming the defendant, tendering a limiting instruction on gang evidence to the jury would not have altered the admission of Luis's and Carlos's gang affiliation,

and defense counsel could still have been able to argue that the defendant acted in self-defense. Thus, we find defense counsel's failure to tender a limiting instruction on gang evidence to the jury was not a matter of valid trial strategy.

¶ 49 However, we find that the defendant cannot satisfy the prejudice prong of the *Strickland* test. Even had a limiting instruction on gang evidence been tendered to the jury, or even assuming *arguendo* that defense counsel's line of questioning on cross-examination of Detective O'Donovan was not valid trial strategy, we hold that there was no reasonable probability that, but for counsel's errors, the result of the trial would have been different. In the case at bar, the defendant testified at trial that he fired the handgun at Luis and Carlos, which was corroborated by Abigail's and Paulette's testimony and the results of the GSR test. The defendant's own testimony revealed that he traveled to 2850 South Avers Avenue to pick up a loaded handgun prior to the shooting, and that he discarded the weapon at the same location following the shooting. The jury also heard Dr. Arunkumar testify that Luis died from two gunshot wounds to his back and that there was no evidence of close-range firing—from which the jury could reasonably infer that the defendant shot Luis while Luis was attempting to flee. Regardless of the poor quality of the videotaped statement, Detective O'Donovan testified that the entirety of the content of the videotape was reflected in his notes and case reports that were completed in connection with the incident, which he reviewed in preparation for trial. Because there was more than ample evidence at trial to convict the defendant, we find that the defendant failed to establish that he was prejudiced by defense counsel's performance at trial.

¶ 50 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 51 Affirmed.